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IKTIKA JAYA v. KETUA SETIAUSAHA, KEMENTERIAN PERTAHANAN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[CIVIL SUIT NO: 21NCVC-54-07-2013]
B 31 OCTOBER 2014

CONTRACT: *Breach – Damages – Terms of contract – Sale and disposal of stricken naval ship at sea – Failure of plaintiff to complete disposal work within stipulated time – Sale of ship by defendants to third party – Termination of contract –* C *Whether defendants had right to terminate contract – Whether valid termination notice given to plaintiff – Whether contract breached*

CONTRACT: *Termination – Right to terminate – Terms of contract – Sale and disposal of stricken naval ship at sea – Failure of plaintiff to complete disposal work* D *within stipulated time – Sale of ship by defendants to third party – Termination of contract – Whether valid termination notice given to plaintiff – Whether contract breached*

In 2009, the defendants' ship caught fire just after it sailed from the naval port at Lumut whilst on a logistical trip to Sabah and Sarawak. As a result of the E fire, the ship ran aground and was partially submerged off the coast of Lumut. *Vide* an open tender for the 'Penjualan dan Pelupusan Ex-kapal Sri Inderapura Sebagai Sisa Besi Kementerian Pertahanan', the plaintiff was selected as the successful tenderer. Pursuant to the letter of acceptance ('LOA') issued by the defendants, the plaintiff paid the sum of RM2,800,000 for the sale/disposal of the ship and deposited a performance bond of F RM140,000. A contract was then executed between both the parties and the duration of the contract was for one year, *ie*, from 20 June 2011 to 19 June 2012. According to the terms of the contract, the floating and towing, and disposal work of the ship was to be completed within 90 days from the date of issuance of the 'Perintah Pengeluaran Pelupusan', *ie*, 20 November 2011. G The plaintiff commenced the disposal work in September 2011. However, due to certain problems in the work environment which was beyond its control, the plaintiff requested for a few extensions of time and the defendants agreed. Subsequently, without the plaintiff's knowledge, it was discovered that the defendants had, at or around February 2013, sold the ship H to Terus Maju Metal. Dissatisfied, the plaintiff filed a claim against the defendants for breach of contract, and prayed for, *inter alia*, special damages and damages for loss of profit. It was the plaintiff's contention that it had effectively bought the ship from the defendants and thereby became the owner of the ship. The defendants, on the other hand, submitted that (i) at I all times, the contract was for the sale and disposal of the ship; (ii) despite the granting of several extensions of time, the Ministry of Defence ('Mindef') wrote a letter of reminder to the plaintiff to complete the disposal work by 15 October 2012; (iii) the plaintiff failed to carry out the project from the

beginning until the expiry of the contract period; (iv) the plaintiff did not carry out the contract works diligently and the progress was very slow; and (v) the Government of Malaysia ('the second defendant') was the owner of the ship and there was no provision in the contract which provided for the transfer of the ownership of the ship to any other party. The issues that arose for determination were (i) whether the plaintiff was the owner of the ship; (ii) whether the defendants had the right to terminate the contract, repossess the ship and award the contract and the ship to a third party; and (iii) whether a valid termination notice of the contract was given by the defendants to the plaintiff.

Held (dismissing plaintiff's claim with costs):

(1) The recital to the contract provides that the second defendant was desirous to sell to the plaintiff and the plaintiff agreed to buy the ship from the second defendant for disposing it off to become scrap metal. The sale and disposal thereafter was referred to as 'pelupusan'. The contract could not be broken into two parts, *ie*, (i) for the sale of the ship; and (ii) for the disposal of the ship. The contract must be read as a whole and it was for both the sale and the disposal of the ship as scrap metal. The words 'menjual … dan … membeli' had to be read conjunctively, more so when after that the provision went on to state 'sesudah ini disebut pelupusan'. Both parties agreed that the word 'pelupusan' was to cover both the sale and the disposal of the ship. The scope of the contract was that the plaintiff was required to buy and take from the second defendant and also to carry out the disposal. (paras 40, 42 & 44)

(2) The second defendant still owned the ship. Even though the plaintiff had paid the contract value of RM2,800,000 and the plaintiff had commenced the disposal work, the ownership of the ship had not been transferred from the second defendant to the plaintiff. The plaintiff was carrying out the contract for the second defendant and did not own the ship even after paying the contract value. The scope for disposal (which meant sale and disposal) of the ship was for Mindef. Further, the performance bond was to ensure that the plaintiff carried out all its contractual obligations until completion of the disposal work. (paras 46, 47 & 50)

(3) The certificate for transfer of ownership was intended for the defendants to certify the completion of the taking over and removal of the ship by the plaintiff under the terms of the contract. Nowhere in the certificate did it state that the ownership of the ship had been transferred or was to be transferred to the plaintiff. Further, in the LOA and the contract, the plaintiff was always referred to as the contractor and not as the owner of the ship. Therefore, at all times of the contractual period, during which the plaintiff failed to complete the 'pelupusan', *ie*, sale and disposal of the ship, the second defendant continued to remain as the

owner of the ship. The plaintiff did not obtain title to be the owner of the ship, notwithstanding that it had paid the contract value of RM2,800,000 to the defendants. (paras 57, 59 & 60)

(4) From a perusal of the LOA and the contract, it appeared that both parties had contracted for a purchase and disposal package, which meant that the purchase would be considered complete once the disposal work was completed. The plaintiff would stand to gain from profits made *vide* the sale of the parts of the ship as scrap metal if it had completed all its obligations under the contract. However, since the plaintiff failed to complete the disposal work, it had suffered a loss. (para 61)

(5) The plaintiff failed to carry out the sale and disposal of the ship within the 90 days' time frame during the contract period of one year. Despite the several extensions of time given by the defendants, the plaintiff failed to complete the disposal work as stipulated in the contract. Pursuant to cls. 11.1.1 and 11.1.2 and 17.1 of the contract, the defendants were entitled to terminate the contract with the plaintiff. Following the termination, the defendants had the right to repossess the ship and award a new contract to a third party, *ie*, Teras Maju Metal as their new contractor to further carry out the disposal work of the ship as scrap metal. (paras 64, 68, 69 & 73)

(6) *Vide* cl. 17.1 of the contract, the second defendant had the right to terminate the contract at any time by giving a written notice of not less than 30 days to the plaintiff if the second defendant was of the opinion that the termination was in the national interest, for national safety or for any government or public policy. The termination arising from the plaintiff's failure to complete the disposal work was in the national interest. It was also for national safety because the continued presence of the ship that ran aground and was partially submerged was hazardous to the environment, and posed a navigational danger to other ships going along the route where the ship was. (paras 78 & 79)

(7) Mindef's letter dated 10 July 2012 gave the plaintiff an extension of time for three months from the date of the letter. Pursuant to the said letter, the termination of the contract would be automatic if after 10 October 2012, the plaintiff still failed to complete the disposal work where the whole sum under the performance bond would be forfeited. In addition, Mindef's letter to the plaintiff dated 27 September 2012 stated, *inter alia*, that '… tiada sebarang perkembangan positif daripada pihak tuan bagi kerja-kerja pengapungan dan pelupusan … Kementerian ini juga ingin memaklumkan bahawa sebarang rayuan permohonan pelanjutan tempoh pelaksanaan kerja-kerja berkaitan tidak akan dipertimbangkan'. The two letters, when read together, were sufficient to serve as a valid notice of termination of the contract to the plaintiff without the necessity to another specific letter or notice of termination being given. (paras 82 & 83)

(8) The effective date of termination of the contract was 15 October 2012. Considering that the plaintiff was the party which had breached the contract when it failed to carry out its contractual obligations to complete the disposal work within the stipulated period, the plaintiff's claim had no merits and was baseless. Thus, the plaintiff's claim for, *inter alia*, special damages, costs of disposal of the ship and damages for loss of profit could not be allowed. (paras 86 & 87)

For the plaintiff - Hazman Harun; M/s Hazman Tan
For the defendants - Khairul Nizam Abu Bakar (Nurhafizza Azizan with him); SFCs

Reported by Kumitha Abd Majid

JUDGMENT

Yeoh Wee Siam J:

Brief Facts

[1] The subject matter in this case involves a ship originally belonging to the defendants called KD Sri Inderapura ("the ship"). In 2009, the ship caught fire just after it sailed from the naval port at Lumut, Perak whilst on a logistical trip, and carrying supplies, to Sabah and Sarawak. As a result of the fire, the ship ran aground and was partially submerged off the coast of Lumut.

[2] The defendants then conducted an open tender for the "Penjualan Dan Pelupusan Ex-Kapal Sri Inderapura Sebagai Sisa Besi Kementerian Pertahanan". Through the tender bidding process, the plaintiff was selected as the successful tenderer.

[3] The defendants then issued a letter of acceptance (Surat Setuju Terima) ("LOA") dated 20 June 2011 (CBOD1 Pt A pp. 53-55) (which was later incorporated as the Seventh Schedule to the contract in CBOD1 Pt A pp. 1-74 at pp. 50-52) which, *inter alia*, stated that the plaintiff's offer of RM2,800,000 for the sale/disposal (Penjualan/Pelupusan) of the ship has been accepted by the defendants and that the plaintiff was required to deposit with the defendants a performance bond of RM140,000.

[4] Pursuant to the LOA, the plaintiff paid the amount of RM2,800,000 for the sale/disposal of the ship, and further deposited with the defendants the performance bond of RM140,000.

[5] A contract titled as "Penjualan Dan Pelupusan Ex-Kapal Sri Inderapura Sebagai Sisa Besi Kementerian Pertahanan" (No. Kontrak: KP/WANG/LUPUS/003/2011) ("the contract") (CBOD1 Pt A pp. 1-74) was executed by both the plaintiff and the defendants. The contract period is for one year from 20 June 2011 to 19 June 2012.

[6] According to a term of the contract, the "Pemunggahan dan Penundaan" of the ship was to be completed within 90 days from the date of the Perintah Pengeluaran Pelupusan ("Perintah Pengeluaran") (CBOD1

Pt A p. 79) is issued. The Perintah Pengeluaran was issued on 22 August 2011. Therefore, the plaintiff was to complete the floating and towing, and disposal work of the ship from 22 August 2011 to 20 November 2011.

[7] The plaintiff commenced the disposal work in September 2011. However, the plaintiff encountered a lot of problems in the work environment which was beyond the control of the plaintiff. The problems caused the plaintiff to request for a few extensions of time ("EOT") from the defendants for the purpose of the disposing the ship. The defendants agreed to several EOT as requested by the plaintiff.

[8] At the end of February 2013, the plaintiff's workers were prevented and obstructed by persons unknown to them from entering and boarding the ship. The plaintiff's workers were told that those persons were from the company, Terus Maju Metal, who are the new owners of the ship and who were appointed by the defendants to dispose of the ship.

[9] The plaintiff immediately lodged a police report and made a visit to the defendants' office to demand an explanation, but none was forthcoming. The plaintiff alleged that the defendants' officers refused to meet the plaintiff. The plaintiff was told by a staff of the defendants that the plaintiff have lost their qualification/ entitlement ("hilang kelayakan"), and was further told that there was a letter informing the plaintiff of the same. However, upon demanding to see the letter, the plaintiff was told that it was not meant to be shown to the plaintiff.

[10] Subsequently, the plaintiff discovered that the defendants had, at or around February 2013, sold the ship to Terus Maju Metal.

[11] The plaintiff contended that it had never received any termination notice from the defendants regarding the contract. Neither was there any notice given by the defendants to the plaintiff regarding the sale of the ship to Terus Maju Metal.

The Plaintiff's Claim

[12] The plaintiff's claim, for breach of contract by the defendants is, *inter alia*, for special damages amounting to RM2,800,000 for the purchase price of the ship (ie, the "article" as is referred to in the contract), RM1,565,333.52 for costs of disposal of the ship, and damages for loss of profit amounting to RM21,840,000, and interests and costs (see statement of claim, paras. 25-27 at pp. 11-15).

Issues To Be Tried

[13] The issues are:

(1) Whether the plaintiff is the owner of the ship;

(2) Whether the defendants have the right to terminate the contract, repossess the ship and award the contract and the ship to a third party;

(3) Whether a valid termination notice of the contract has been given by the defendants to the plaintiff.

Consideration And Findings

Regarding Issue (1)

The Plaintiff's Case

[14] The plaintiff contended that the contract consists of two parts as follows:

(i) The sale and purchase of the ship; and

(ii) The disposal of the ship within a specified period.

[15] The plaintiff further contended that it had effectively bought the ship from the defendants and thereby became the owner of the ship. The contract that was signed between the plaintiff and the defendants shows that the ship belongs to the plaintiff as can be seen in the following:

(i) The defendant had an open tender exercise for the "Penjualan Dan Pelupusan Ex-Kapal Sri Inderapura Sebagai Sisa Besi Kementerian Pertahanan".

(ii) The sale of the ship was conducted by the Cawangan Pengurusan Aset, Bahagian Kewangan, Kementerian Pertahanan ("Cawangan Pengurusan Aset"), whose function was for the disposal of assets belonging to the defendants.

(iii) Kassim bin Mahmud ("DW1"), the Ketua Penolong Setiausaha, Cawangan Pengurusan Aset, during cross-examination, admitted that the plaintiff offered the price of RM2,800,000 for the sale of the ship that was on tender. The offer price was, in turn, accepted by the defendants. The plaintiff paid the purchase price of RM2,800,000 (CBOD1 Pt A pp. 1-74).

(iv) Upon payment of the purchase price amounting to RM2,800,000 to the defendants, a receipt was issued by the defendants through Bahagian Kewangan Cawangan Pengurusan Aset, Kementah (CBOD1 Pt A p. 80). In the receipt, at the column "Perihal Terimaan" it is stated that the reason for the acceptance of the amount is for the "Penjualan Brg Stor Yang Lain (Bkn Pembangunan)". In the particulars under "Catatan" it is stated "Penjualan/ Pelupusan Ex Kapal Inderapura Sbg Sisa Besi Di Kementah".

(v) A contract titled "Penjualan Dan Pelupusan Ex-Kapal Sri Inderapura Sebagai Sisa Besi Kementerian Pertahanan" (No. Kontrak: KP/WANG/LUPUS/003/2011) (CBOD1 Pt A pp. 1-74) was executed by both parties the terms of which clearly stipulate the sale of the ship to the plaintiff. Apart from the title of the contract itself, the following terms and wordings found in the contract denote the intention of the parties for the sale and purchase of the ship:

A (a) Bahawasanya KERAJAAN berhasrat untuk **menjual** kepada KONTRAKTOR dan KONTRAKTOR bersetuju untuk **membeli dan mengambil** daripada KERAJAAN Ex-Kapal Sri Inderapura (sesudah ini disebut "ARTIKEL") ... (CBOD1 Pt A p. 4);

(b) KONTRAKTOR hendaklah **membeli dan mengambil daripada** KERAJAAN ... (CBOD1 Pt A p. 5) (emphasis added).

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(vi) Further, the terms and wordings of the contract suggest a distinction is made between the sale of the ship and the disposal work of the ship, as stated below:

C (a) The word "Pelupusan" has been clearly defined in the contract. Under the interpretation clause (cl. 1.1.4) (CBOD1 Pt A p. 5) the word is interpreted as "ertinya Skop Pelupusan sebagaimana di Jadual Pertama kepada Kontrak ini yang merupakan spesifikasi Pelupusan Ex-Kapal Sri Inderapura".

D The Fifth Schedule to the contract (CBOD1 Pt A p. 31) deals exclusively on the scope of works for the disposal of the ship.

There is no mention at all about the sale and purchase of the ship under the interpretation of the word "Pelupusan". Therefore, the word "pelupusan" means exactly what the parties had intended it to mean ie, disposal (pelupusan).

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(b) The contract made a distinction about payment for the purchase of the ship and payment for the disposal of the ship.

F Payment for the purchase of the ship is provided in cl. 7 (CBOD1 Pt A p. 9) where the plaintiff is required to make payment of the contract value (Nilai Kontrak) of RM2,800,000 in full 14 days after the signing of the LOA. Whereas, payment for the disposal of the ship is provided in the form of a performance bond in cl. 5 (CBOD1 Pt A p. 7).

G The plaintiff made both payments promptly. The plaintiff paid for the purchase of the ship in full as evidenced by the receipt of payment (CBOD1 Pt A p. 80) given by the defendants. Clearly, the intention of the parties can be read from this distinction made in the contract. The sale of the ship is distinct from the performance of the disposal work of the ship ("the disposal work").

H

(c) A distinction between the sale of the ship and the performance of the disposal work was further made in cl. 8, where the period for disposal of the ship is provided. According to cls. 8.1 and 8.2 (CBOD1 Pt A p. 9), the plaintiff was required to dispose of the ship within 90 days from the date the Perintah Pengeluaran was issued by the defendants. This clause clearly denotes the obligation of the plaintiff to dispose of the ship within the stipulated period and the word "pelupusan" has been clearly defined in cl. 1.1.4.

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(d) The consequences of a breach of the contract also demonstrates the distinction made in the contract between the sale of the ship and performance of the obligation for the disposal of the ship. There are two clauses in the contract which provide for the consequences of breach of the contract, and both clauses only deal with the failure in the disposal of the ship.

Clause 8.3 (CBOD1 Pt A p. 9) provides that the failure of the plaintiff to dispose of (melupuskan) the ship within 90 days shall give the defendant the right to charge a late penalty amounting to 10% of the contract sum.

Clause 11 (CBOD1 Pt A p. 11) provides three options available to the defendants in the event of a failure on the part of the plaintiff to dispose the ship.

The two clauses mentioned above clearly provide the rights given to the defendants in the event the plaintiff fails to dispose of the ship within the stipulated time period. The clauses did not mention or touch upon the ownership of the ship.

The Defendants' Case

[16] On the other hand, the defendants contended that at all times the contract was for the sale and disposal of the ship.

[17] DW1 testified that despite the fact that the plaintiff was required to complete the contract works within the 90 days from the date of issue of the Perintah Pengeluaran ie, within the period from 22 August 2011 to 20 November 2011, the plaintiff failed to do so.

[18] The plaintiff applied to the defendants for extension of time ("EOT") on several occasions to complete the contract works/ disposal work ("disposal work"). The defendants had allowed the following EOT:

(i) First EOT until 31 December 2011 (CBOD1 Pt B pp. 81-82);

(ii) Second EOT for 45 days until 15 February 2012 (CBOD1 Pt B p. 83);

(iii) Third EOT until 15 May 2012 (CBOD1 Pt B p. 83);

(iv) The plaintiff applied on 16 April 2012 for a fourth EOT of five months until 15 October 2012 but the first defendant dismissed the application and only allowed an EOT for 45 days until 31 March 2012 (CBOD1 Pt B p. 84).

[19] As on 31 March 2012 the plaintiff had still not completed the disposal work under the contract.

[20] *Via* its letter dated 5 June 2012, the plaintiff applied for another EOT. The Ministry of Defence ("Mindef") allowed an EOT for three months from the date of its letter, 10 July 2012, until 10 October 2012.

[21] On 27 September 2012, Mindef wrote a letter of reminder to the plaintiff, as the contractor, to complete the disposal work on 15 October 2012 (CBOD1 Pt B p. 97). The plaintiff was informed that any appeal for an EOT would not be considered.

[22] On 15 October 2012, the plaintiff still failed to complete the disposal work as stated in the contract.

[23] According to DW1, the date of termination of the contract is 15 October 2012.

[24] On 29 October 2012 the plaintiff again applied for an EOT of eight months. The matter was referred to the Minister of Mindef (CBOD4 Pt B pp. 43-45). However, the Minister minuted a direction that the defendants take steps to obtain another quotation ("Sebutharga").

[25] The first defendant then received the plaintiff's letter dated 8 January 2013 (CBOD1 Pt B p. 157) informing the first defendant that the plaintiff would commence the continuation of the works for the floating and disposal of the ship on "14 January 2012" (note: the plaintiff stated the date wrongly as 14 January 2012. The correct date should be 14 January 2013 since the plaintiff's letter was dated 8 January 2013).

[26] Mindef replied *via* its letter dated 14 January 2013 (CBOD1 Pt B pp. 158-159) informing the plaintiff that Mindef had never issued any direction to the plaintiff to continue with the disposal work and the plaintiff was not allowed to execute any works connected to the ship.

[27] DW1 stated that the second defendant is the owner of the ship, and there is no provision in the contract providing for the transfer of ownership of the ship to any other party.

[28] DW1 further stated that the contract was terminated on 10 October 2012 because the plaintiff had failed to carry out the project from the beginning until the expiry of the contract period.

Whether It Is A Contract For Sale And Disposal Of The Ship, Or Whether It Is A Contract For Sale/Disposal Of The Ship

[29] At the outset, this court does not think that the evidence of Rashidi bin Khalid ("PW1") is hearsay evidence. PW1 is the assistant manager of the plaintiff and he worked closely with and under the supervision of Dato' Mat Salleh bin Abdullah (now deceased), the manager of the plaintiff at the material time. PW1 had personal knowledge of the LOA and the contract and all dealings between the plaintiff and the defendants. He is therefore a competent witness to testify on behalf of the plaintiff.

[30] As for Hishamuddin bin Saifullizan ("PW2"), he was authorised by his uncle, Tuan Haji Amin, the director of Mahn Management Sdn Bhd ("Mahn Management") to manage the plaintiff's project with the defendants under the contract to make it a success. The plaintiff and Mahn Management

had entered into a joint venture agreement to carry out the plaintiff's obligations under the contract with the defendants. There is no privity of contract between Mahn Management and the defendants. However, the joint venture agreement between the plaintiff and Mahn Management is not an issue to be tried in these proceedings. PW2's evidence is only relevant regarding his role as a project manager and supervisor of the plaintiff's project under the contract with the defendants, including managing the administrative, marketing and financial aspects of the project.

[31] Bearing in mind the contentions of both parties as set out earlier in this judgment, the court would now examine the documents to determine the express and/or implied intention of the parties to the contract.

[32] The first document governing the contractual relationship between the two parties is the letter of acceptance ("LOA") dated 20 June 2011 issued by Mindef (CBOD1 Pt A pp. 53-55) to the plaintiff. This letter is titled, *inter alia*, "Penjualan/Pelupusan Ex Kapal Inderapura Sebagai Sisa Besi Untuk Kementerian Pertahanan". From this title, it is to be noted that the LOA is regarding the sale/disposal of the ship as scrap metal by Mindef. So it appears to be either a sale or a disposal of the ship.

[33] The first paragraph of the LOA states as follows:

> Merujuk **kepada tender tuan untuk penjualan/pelupusan** yang tersebut di atas dan rundingan yang telah diadakan antara wakil-wakil Kerajaan dengan pihak tuan pada 14 Jun 2011 di Kementerian Pertahanan, yang mana **telahpun dipersetujui oleh kedua-dua pihak, bahawa terma-terma** sebagaimana yang terkandung **dalam Lampiran A bersama-sama ini dianggap sebagai menjadi sebahagian terma-terma tender** dan yang terma-terma tendernya hendaklah, setakat memasukkan terma-terma yang terkandung dalam Lampiran itu, diubahsuai, dengan ini Kerajaan Malaysia dengan sukacitanya telah bersetuju menerima tender tuan sebagaimana yang diubahsuaikan. (emphasis added).

[34] The above first paragraph reiterates that it is a tender for the sale/disposal of the ship, but it states that the terms agreed to by both parties are as contained in Lampiran A.

[35] In Lampiran A (CBOD1 Pt A pp. 57-61), the following term in Bil. 1 (p. 57) is to be noted:

PERKARA	MAKLUMAT
Perihal Kontrak:	Penjualan Dan Pelupusan Ex Kapal Inderapura Sebagai Sisa Besi Untuk Kementerian Pertahanan Malaysia.

[36] From Bil. 1 of Lampiran A above, it is clear that the LOA is regarding the sale and disposal of the ship as scrap metal. The word "Penjualan" is to read conjunctively with the word "Pelupusan" by virtue of the use of the connecting word, "Dan".

[37] Bil. 5 of Lampiran A states that the Nilai Kontrak is RM2,800,000. Therefore, the contract value for the contract between the two parties for the sale and disposal of the ship is RM2,800,000.

[38] The terms in the LOA have been modified and incorporated into the contract that was signed by the defendants on 22 August 2011 and by the plaintiff on 23 August 2011 (CBOD1 Pt A pp. 1-74).

[39] The following terms of the contract are noted by this court:

In the third paragraph of the recital to the contract (CBOD1 Pt A p. A), it is stated:

> Bahawasanya KERAJAAN berhasrat **untuk menjual** kepada KONTRAKTOR dan KONTRAKTOR bersetuju **untuk membeli dan mengambil** daripada KERAJAAN, Ex-Kapal Sri Inderapura (sesudah ini disebut 'ARTIKEL') **untuk melupuskannya** menjadi sisa besi seperti yang dinyatakan dalam Jadual Pertama kepada kontrak ini (sesudah ini disebut 'PELUPUSAN') dan KONTRAKTOR telah bersetuju **untuk melaksanakan PELUPUSAN** tersebut mengikut syarat-syarat yang dinyatakan di bawah ini. (emphasis added).

[40] From the above third paragraph of the recital, it is clear that the second defendant (ie, the Government of Malaysia) ("Government") was desirous to sell to the plaintiff (ie, the contractor), and the plaintiff agreed to buy and take from the second defendant the ship (ie, the article) for disposing of the ship to become scrap metal as stated in the First Schedule. The sale and disposal thereafter are to be referred to as "PELUPUSAN". The plaintiff, as contractor, then agreed to carry out the "PELUPUSAN".

[41] In other words, the contract is for the sale and disposal of the ship as scrap metal. However, for the purpose of the contract, the sale and disposal taken together are to be termed as "PELUPUSAN" or "DISPOSAL".

[42] With respect to learned counsel for the plaintiff, the contract cannot be broken into two parts ie, for (i) the sale of the ship, and (ii) for the disposal of the ship. The contract must be read as a whole. The intention is expressly stated, namely that the contract is for both the sale and the disposal of the ship as scrap metal. The words "menjual ... dan ... membeli" have to be read conjunctively, and not disjunctively, more so when after that the provision went on to state "(sesudah ini disebut 'PELUPUSAN')". Both parties have also agreed that the word "PELUPUSAN" is to cover both the sale and the disposal of the ship.

[43] The same intention is restated in cl. 2 of the contract which reads as follows:

> KLAUSA 2 – SKOP KONTRAK
>
> 2.1 KONTRAKTOR hendaklah membeli dan mengambil daripada KERAJAAN serta melaksanakan PELUPUSAN seperti di Jadual pertama kepada Kontrak ini, dengan sentiasa tertakluk kepada

syarat-syarat yang dinyatakan di bawah Kontrak ini dari semua segi dan mengikut arahan sehingga memuaskan kehendak KERAJAAN.

[44] Based on cl. 2.1 of the contract, the scope of the contract is that the plaintiff is required to buy and take from the second defendant and also carry out "PELUPUSAN" or disposal according to the First Schedule (CBOD1 Pt A p. 31) to the contract.

[45] The First Schedule to the contract is titled "Skop Pelupusan Ex Kapal Inderapura Sebagai Besi Untuk Kementerian Pertahanan". Bil. 4 of the First Schedule states that the "Tempoh pengapungan dan pelupusan kapal" is "Sembilan puluh (90) hari dari tarikh Perintah Pengeluaran".

[46] From the title to the First Schedule to the contract and Bil. 4 as above, the court finds that the scope for disposal (which means sale and disposal) of the ship is "UNTUK", or FOR Mindef. The scope for disposal is not for the plaintiff, as the contractor, but for Mindef.

[47] These two provisions show that the second defendant still owns the ship. Even though the plaintiff had paid the contract value of RM2,800,000, and the plaintiff had commenced the disposal work, the ownership of the ship has not been transferred from the second defendant to the plaintiff. The plaintiff was carrying out the contract for the second defendant. The plaintiff did not own the ship even after paying the contract value.

[48] Under cl. 5.2 of the contract, the performance bond of RM140,000 ie, 5% from the contract value was to be executed by the plaintiff "untuk menjamin pelaksanaan obligasi-obligasi kontrak di bawah Kontrak ini".

[49] Under cl. 5.3 of the contract, the performance bond is to be valid for 12 months after the date of expiry of the contract or from the last date of disposal, whichever is later.

[50] The provisions in cls. 5.1 to 5.6 of the contract fortify this court's view that the contract is for disposal (ie, sale and disposal) of the ship as scrap metal, and the performance bond is to ensure that the plaintiff carries out all its contractual obligations until completion of the disposal work.

[51] The effective period of the contract is stipulated in cl. 6 of the contract as follows:

KLAUSA 6 – TEMPOH KUAT KUASA KONTRAK

6.1 Tanpa mengambil kira tarikh Kontrak ini ditandatangani, Kontrak ini akan berkuat kuasa selama satu (1) tahun mulai 20 Jun 2011 hingga 19 Jun 2012. Pengesyoran penyambungan tempoh kuat kuasa Kontrak ini boleh dibuat secara bertulis oleh mana-mana Pihak dalam masa enam (6) bulan sebelum tarikh tamatnya Kontrak ini. Penyambungan tempoh kuat kuasa Kontrak hanya boleh dibenarkan di atas persetujuan bersama kedua-dua Pihak melalui satu pindaan kepada Kontrak ini yang akan dibaca sebagai sebahagian daripada Kontrak ini.

[52] Clause 8 of the contract provides for the period of time for disposal (ie, sale and disposal):

> KLAUSA 8 – TEMPOH MASA PELUPUSAN
>
> 8.1 KERAJAAN hendaklah mengemukakan Perintah Pengeluaran format seperti di Jadual Kelima kepada KONTRAKTOR.
>
> 8.2 KONTRAKTOR dikehendaki melaksanakan PELUPUSAN ARTIKEL dalam tempoh sembilan puluh (90) hari dari tarikh Perintah Pengeluaran.
>
> 8.3 Kegagalan pihak KONTRAKTOR untuk melaksanakan PELUPUSAN dalam tempoh yang dinyatakan dalam Klausa 8.2 di atas akan memberi hak kepada pihak KERAJAAN untuk mengenakan denda lewat sebanyak sepuluh peratus (10%) dari nilai Kontrak.

[53] Learned counsel for the plaintiff submitted that where the plaintiff has failed to complete the disposal work within the 90 days from the date of issue of the Perintah Pengeluaran, the defendants should not resort to termination of the contract, but instead should impose a late penalty of 10% of the contract value in accordance with cl. 8.3. Here, the court reiterates that "PELUPUSAN" in cls. 8.2 and 8.3, by virtue of the third paragraph of the recital as explained by this court earlier, would mean the sale and disposal of the ship as scrap metal.

[54] This means that it is not the proper recourse (as submitted by learned counsel for the plaintiff) for the defendants to impose the 10% late penalty in the present case where the plaintiff had not only failed to complete the "PELUPUSAN" (ie, sale and disposal) of the ship with the 90 days from 22 August 2011 to 20 November 2011, but had even failed to complete the "PELUPUSAN" in the several EOT beyond the 90 days, which had been given by the defendants. The defendants could invoke cl. 8.3, and impose the late penalty of 10% of the contract value. However, cl. 8.3 does not preclude the defendants from exercising their right to terminate the contract with the plaintiff under cl. 11 of the contract which provides for such termination (which will be dealt with later in this judgment).

[55] There appears to be no term or provision in the contract for transfer of ownership of the ship to the plaintiff.

[56] The "Perakuan Serahan Pindah Milik" ("the certificate") in Lampiran E of the LOA (CBOD1 Pt A p. 73) in cl. 1 provides:

> 1. Menurut Klausa-Klausa Kontrak, maka adalah dengan ini diperakukan bahawa segala pengambilan dan pengalihan Ex Kapal Inderapura, yang dikehendaki disempurnakan oleh tuan di bawah syarat-syarat Kontrak, telah disempurnakan oleh tuan pada ...

[57] The above certificate for transfer of ownership is intended for the defendants to certify the completion of the taking over and removal of the ship by the plaintiff under the terms of the contract.

[58] In cls. 2(a)(i), 2(b)(i) and 2(b)(ii), the same certificate provides for the release of the performance bond and bank guarantee to the plaintiff, or for the plaintiff to pay further sums to the Government if the amount under the performance bond is not sufficient, as the case may be.

[59] Nowhere in the certificate does it state that the ownership of the ship has been transferred, or is to be transferred to the plaintiff.

[60] As what DW1 had testified, there is no provision in the LOA and contract for the defendants to transfer the ownership of the ship to the plaintiff. The court notes that in these two documents, the plaintiff was always referred to as the contractor, and never as the owner of the ship. Therefore, it is without doubt that at all times of the contract period, during which the plaintiff failed to complete the "PELUPUSAN" (ie, sale and disposal) of the ship, the second defendant continued to remain as the owner of the ship. The plaintiff did not at any time obtain title to be the owner of the ship, notwithstanding that it had paid the contract value of RM2,800,000 to the defendants.

[61] Learned counsel for the plaintiff posed the question as to what happens to the RM2,800,000 paid by the plaintiff to the defendants under the contract if it was not to purchase and own the ship. From a careful perusal of the terms of the LOA and the contract, it appears to this court that both parties had contracted for a purchase and disposal package, which means the purchase would be considered complete once the disposal work is completed. As can be seen from the plaintiff's own claim, in particular the claim for special damages and loss of profit, the plaintiff would stand to gain a lot, from profits made from the sale of the parts of the ship as scrap metal (see evidence of PW2, PW4 and PW5), and the sale of the ALCO engines, propellers, other equipment, and diesel oil etc, of the ship if it had completed all its obligations under the contract. However, since the plaintiff failed to complete the disposal work, it follows that the plaintiff could not proceed to make profits, but instead suffered a loss. This is part of the business risk that the plaintiff had to take when it executed a contract of this nature.

Regarding Issue (2)

[62] Clause 11 of the contract provides the defendants with the right to terminate the contract in accordance with sub-cl. 17.1 as follows:

> KLAUSA 11 – HAK KERAJAAN APABILA PERLANGGARAN SYARAT KONTRAK, DAN TIDAK MEMUASKAN, LEWAT ATAU GAGAL MENYEMPURNAKAN PELUPUSAN.
>
> 11.1 Jika KONTRAKTOR gagal melaksanakan PELUPUSAN mengikut skop seperti di Jadual Pertama Kontrak ini dalam tempoh yang dinyatakan dalam Klausa 8.1 Kontrak ini, maka KERAJAAN berhak:
>
> 11.1.1 Menamatkan Kontrak ini selaras dengan sub-klausa 17.1 Kontrak ini dan dengan itu Bon Pelaksanaan akan dirampas selaras dengan sub-klausa 5.4 Kontrak ini dan KERAJAAN

A sentiasa berhak menuntut gantirugi yang timbul akibat penamatan Kontrak dan gantirugi kelewatan selaras dengan klausa 11.1.3.1 Kontrak ini, dikira dari tarikh PELUPUSAN sepatutnya dilaksanakan dengan sempurna.

Dan/Atau

B 11.1.2 KERAJAAN berhak membatal Kontrak ini dan mendapatkan PELUPUSAN di bawah Kontrak ini dari punca-punca lain di mana sekiranya harga PELUPUSAN daripada punca-punca lain tersebut lebih rendah daripada nilai kontrak ini, KONTRAKTOR adalah bertanggungjawab untuk membayar kepada KERAJAAN perbezaan harga tersebut.

C Dan/Atau

11.1.3 Setuju terima PELUPUSAN itu dan mengenakan denda berikut:

D 11.1.3.1 Bagi setiap hari kelewatan gantirugi sebanyak sepuluh peratus (10%) dari nilai harga Kontrak setahun yang dikenakan ke atas KONTRAKTOR.

11.2 KONTRAKTOR hendaklah membayar apa-apa amaun kos yang dituntut oleh pihak ketiga kepada KERAJAAN di atas kelewatan atau kegagalan KONTRAKTOR untuk melaksanakan PELUPUSAN
E yang tidak memuaskan atau perlanggaran mana-mana syarat dan klausa di bawah Kontrak ini oleh KONTRAKTOR.

11.3 Hak KERAJAAN di bawah klausa ini adalah tanpa menjejaskan hak-hak lain KERAJAAN yang wujud di bawah Kontrak ini.

[63] Clause 17 of the contract stipulates the right of the second defendant
F to terminate the contract in the national interest:

KLAUSA 17 - PENAMATAN KONTRAK ATAS KEPENTINGAN NEGARA

17.1 Tidak tertakluk kepada mana-mana peruntukan dalam Kontrak ini,
G KERAJAAN berhak menamatkan Kontrak ini pada bila-bila masa dengan memberi notis bertulis tidak kurang daripada tiga puluh (30) hari kepada KONTRAKTOR (tanpa perlu memberi apa-apa sebab) sekiranya KERAJAAN berpendapat penamatan itu perlu dilaksanakan atas kepentingan Negara, kepentingan keselamatan negara atau bagi tujuan polisi KERAJAAN atau polisi awam.

H 17.2 Bagi maksud Klausa ini, perkara yang berjumlah kepada "kepentingan negara", "kepentingan keselamatan negara", "polisi kerajaan" dan "polisi awam" hendaklah diputuskan oleh KERAJAAN sahaja dan keputusan itu adalah muktamad dan tidak boleh dicabar.

I 17.3 Pihak-Pihak bersetuju bahawa KONTRAKTOR tidak berhak untuk menuntut sebarang kerugian termasuk kehilangan perolehan pendapatan, pampasan, tuntutan, gantirugi atau sebagainya atas penamatan kontrak ini.

[64] In the present case, the defendants' evidence shows that the plaintiff failed to carry out the "PELUPUSAN" (ie, sale and disposal) of the ship within the 90 days from 22 August 2011 to 20 November 2011 during the contract period of one year from 20 June 2011 to 19 June 2012. Despite the several EOT given by the defendants (as spelt out earlier under Issue (1)), the plaintiff continued to fail to complete the disposal work as stipulated in the contract, in particular the First Schedule.

[65] The "Maklumbalas Prestasi Terkini Kerja-Kerja Pengapungan Dan Pelupusan Ex-Kapal Sri Inderapura" dated 31 May 2012 (CBOD1 Pt B pp. 86-88) given by Capt. Ir. Ow Kiat Bin ("DW2"), the captain of TLDM, to Cawangan Pengurusan Aset of Mindef reported, *inter alia*, the following poor performance of the plaintiff in carrying out the disposal work under the contract:

> 1. Berhubung dengan perkara dan rujuk di atas, dimajukan maklumbalas prestasi dan perkembangan terkini kerja-kerja pengapungan dan pelupusan Ex-Kapal SRI INDERAPURA oleh Syarikat IKTIKA JAYA Sdn Bhd seperti berikut:
>
> a. Perancangan kerja-kerja pengapungan dan pelupusan kapal oleh kontraktor terbahagi kepada tiga Fasa seperti berikut:
>
> | | | |
> |---|---|---|
> | (1) Tarikh Serah Projek | – | 22 Ogos 11 |
> | (2) Tarikh Mula Kerja | – | 4 Sep 11 |
> | (3) Fasa Pertama | – | 4 Sep-7 Nov 11 (kerja-kerja pemotongan dan pemindahan besi di bahagian atas kapal sehingga geladak 0 (0 deck). |
> | (4) Fasa Kedua | – | 7-24 Nov 11 (kerja-kerja pengapungan kapal) |
> | (5) Fasa Ketiga | – | 25 Nov 11 (tapak pelupusan) |
>
> b. Pada keseluruhan kerja-kerja pengapungan dan pelupusan kapal adalah dianggap gagal. Peratusan keseluruhan kerja adalah 40% (Fasa Pertama). Sehingga kini kapal masih berada di posisi asal semasa ianya dikandaskan. Malah keadaan kapal dilihat sedikit melurut dari tebing semasa ianya dikandaskan ke bahagian yang lebih dalam sehingga menenggelam 70% bahagian badan kapal. Kali terakhir usaha untuk mengapungkan kapal ini dilaksanakan adalah pada pertengahan bulan Feb dengan menggunakan kaedah lima buah banana lifting bag yang menemui kegagalan (syarikat sub kontraktor kedua dilantik oleh kontraktor). Sejak itu tiada sebarang usaha atau tindakan dari pihak kontraktor untuk melaksanakan kerja-kerja pengapungan.

A

c. Berdasarkan rekod jelas pihak kontraktor tidak komited dan tidak profesional dalam menangani permasalahan, malah tidak pernah melaksanakan mesyuarat progres setelah beberapa kali tempoh lanjutan kerja diluluskan walaupun kerja-kerja pengapungan menemui kegagalan. Dimaklumkan juga bahawa sehingga kini tiada pertemuan dan perbincangan dilaksanakan oleh pihak kontraktor bersama pegawai pemantau dan wakil agensi-agensi terlibat sepertimana yang dinyatakan oleh pihak kontraktor melalui surat Rujuk D.

B

d. Pihak kontraktor dilihat lebih mementingkan kepada kerja-kerja pemotongan dan pengambilan besi pada bahagian struktur utama kapal. Perubahan amat ketara pada bahagian struktur utama semasa lawatan pemantauan oleh Pegawai Pemantau pada 21 Mei yang lalu. Lawatan terakhir pada bulan Feb 12 keadaan struktur utama masih kekal berserta Meriam 40/70 (Stbd). Kerja-kerja pemotongan dan pengambilan besi ini dipercayai dilaksanakan secara aktif pada bulan Mac dan berakhir pada awal bulan Mei. Lebih menyedihkan dan tidak seharusnya berlaku kepada kontraktor yang bertanggungjawab membiarkan Meriam 40/70 (Stbd) yang seharusnya dipulangkan kepada pihak TLDM diletak terbiar dibahagian dek utama. Gambar keadaan kapal dibulan Feb dan keadaan terkini pada 21 Mei seperti di Kembaran A.

C

D

E

e. Berdasarkan kepada pemerhatian terakhir, keseluruhan kerja-kerja pemotongan dan pengambilan besi telah dilaksanakan di bahagian atas geladak utama (00 deck) termasuk struktur utama adalah 85%. Sementara perancangan sebenar oleh pihak kontraktor bagi kerja-kerja pengapungan adalah tidak meyakinkan.

F

2. Kegagalan melaksanakan kerja-kerja pengapungan telah menjejaskan imej dan memberi tamparan yang negatif kepada TLDM khasnya dan KEMENTAH amnya. Justeru, disarankan pihak tuan agar mencari jalan penyelesaian terbaik untuk mengapungkan kapal ini dan seterusnya memindahkannya dari lokasi tersebut dengan melantik kontraktor yang berwibawa dan berkemampuan.

G

[66] DW2's oral testimony of the same was also corroborated by the evidence of Lt. Komander Mohd Tawil bin Tajudin (TLDM) ("DW3"), the head of the TLDM monitoring team for the project under the contract. DW3 monitored the plaintiff's work under the contract by boarding a boat and going next to the ship where he could personally see the disposal work and the progress.

H

[67] Both DW2 and DW3 confirmed that the plaintiff did not carry out the contract works diligently and the progress was very slow. DW3 further stated that the plaintiff was more interested in cutting and taking the main structure of the ship but had no plan to do the work for floating the ship. DW3 confirmed that the plaintiff did not complete the disposal work within

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the 90 days from the date of issue of the Perintah Pengeluaran ie, from 22 August 2011 to 20 November 2011. Further, the plaintiff failed to complete the disposal work during the several EOT given by the defendants.

[68] Going by the evidence of DW1, DW2 and DW3, it is clear that the plaintiff did not carry out its contractual obligations and failed to complete the "PELUPUSAN" as required by the LOA and contract. Therefore, pursuant to cls. 11.1.1 and 11.1.2, and cl. 17.1 of the contract, the defendants are entitled to terminate the contract with the plaintiff.

[69] Following the termination of the contract, the second defendant is entitled under cl. 11.1.2 to get the "PELUPUSAN" under the contract to be undertaken by other sources. Thus, the defendants are entitled to appoint Teras Maju Metal as their new contractor to further carry out the disposal work of the ship as scrap metal.

[70] The plaintiff conceded that there were delays in the disposal of the ship. The plaintiff, through its various witnesses, PW1 to PW5, adduced evidence to show that the delays were unavoidable mainly due to the extreme and inhospitable conditions faced by the plaintiff in carrying out the disposal work of the ship. The plaintiff contended that it had never given up in carrying out the disposal work of the ship, and such work had to be done in a manner which is also safe for the environment. Evidence was adduced regarding the tribulations faced by the plaintiff in carrying out the disposal work of the ship. PW3, who was the supervisor on site, testified of the unforgiving and inclement weather, rough seas and strong undercurrents. The plaintiff's problem was compounded with the absence of detailed plans of the ship which (though requested, was never provided by the defendants). The severity of the working conditions and environment was grimly and tragically illustrated when the life of a diver was lost while working underwater in the plaintiff's effort to float the ship.

[71] Learned counsel for the plaintiff submitted that the delay in disposing the ship on the part of the plaintiff was not for want of trying. As a matter of fact, the plaintiff had even progressed into the second phase of the three phase work schedule. The first phase involves the cutting and transfer of the scrap metal; Phase 2 involves the floating of the ship; and Phase 3 involves the disposal work on land at Teluk Senangin. PW3 stated that the plaintiff was in the second phase in which the plaintiff was endeavouring to float the ship. Even DW3 had to admit, under cross-examination, that the plaintiff's divers were working underwater on the ship when he came to inspect the progress of the disposal work.

[72] Despite the plaintiff's alleged progress in the disposal work, the court finds that there were several delays in carrying out the disposal work. In view of the reasons given by the plaintiff for the delays, the defendants had allowed the various EOT. However, even with the several the EOT given, the plaintiff was still not able to complete the disposal work within the required extended period.

[73] Therefore, the defendants have the right to terminate the contract, and repossess the ship and award a new contract to a third party, in this case, Teras Maju Metal.

Regarding Issue (3)

[74] Under cl. 6.1 of the contract, the contract is effective for one year from 20 June 2011 to 19 June 2012. Any proposal to extend the effective period of the contract may be made in writing by any party within six months before the expiry date of the contract. The continuation of the contract period can be allowed based on the consent of both parties by way of an amendment made to the contract which should be read as part of the contract.

[75] The court finds that there is no evidence of any amendment being made to the contract to extend the contract period. As such, there was no formal contractual amendment made in order to extend the contract period of one year.

[76] However, there is evidence that the defendants granted the plaintiff the first EOT until 31 December 2011, the second EOT until 15 February 2012, the third EOT until 15 May 2012, the fourth EOT until 31 March 2012 and the fifth and final EOT ("the final EOT") until 15 October 2012. The contract period of one year was from 20 June 2011 to 19 June 2012. The first four EOT were within the contract period. However, the final EOT was outside the contract period of one year.

[77] Even with the final EOT until 15 October 2012, the plaintiff could not complete the disposal work. The defendants are therefore entitled to terminate the contract.

[78] Under cl. 17.1 of the contract, without being subject to any provision in the contract, the second defendant has the right to terminate the contract at any time by giving a written notice of not less than 30 days to the plaintiff if the second defendant is of the opinion that the termination is in the national interest, for national safety, or for any government or public policy.

[79] In this case, according to DW1, the plaintiff's failure to complete the disposal work by 15 October 2012 was in the national interest. It was also for national safety because the continued presence of the ship that ran aground and was partially submerged was hazardous to the environment, and posed a navigational danger to other ships going along the route where the ship was.

[80] The reasons given by the defendants for terminating the contract are justified. The question is whether the defendants have given the plaintiff the requisite 30 days notice under cl. 17.1 for termination of the contract.

[81] The court finds that there was no specific letter of termination given 30 days before the termination date on 15 October 2012.

[82] The defendants relied on the following two documents:

(1) Mindef's letter dated 10 July 2012 (CBOD1 Pt B p. 96) where the plaintiff was informed of Mindef's approval of the plaintiff's application made *via* its letter dated 5 June 2012 for an EOT with the following conditions:

> (i) pihak tuan dikehendaki menyelesaikan semua kerja-kerja pelupusan seperti mana yang telah ditetapkan di dalam dokumen perjanjian kontrak dalam tempoh tiga (3) bulan dari tarikh surat ini dan tanpa mengenepikan hak Kerajaan untuk mengenakan denda lewat ke atas syarikat tuan;
>
> (ii) kegagalan pihak tuan untuk menyiapkan kerja-kerja pelupusan dalam tempoh yang dibenarkan seperti di para (i) akan menyebabkan bon pelaksanaan pihak tuan sebanyak RM140,000.00 dirampas;
>
> (iii) pihak Kerajaan akan mendapatkan perkhidmatan daripada punca-punca yang lain, mengikut klausa-klausa yang diperuntukkan di dalam kontrak; dan
>
> (iv) pihak tuan juga dikehendaki mengeluarkan semua peralatan yang berada di lokasi pelupusan sekiranya gagal melaksanakan kerja mengikut tempoh yang diluluskan.

The court is of the view that based on cls. (i) and (ii) of the above letter, the defendants had in fact given the plaintiff the requisite 30 days notice to terminate the contract. Mindef's letter is dated 10 July 2012. The plaintiff was given an EOT of three months from the date of the letter, 10 July 2012, until 9 October 2012. The court accepts the evidence of DW1 given in his re-examination that pursuant to cl. (ii) above, the termination of the contract would be automatic if after 10 October 2012, the plaintiff still failed to complete the disposal work, in which case the whole sum under the performance bond would be forfeited. DW1 confirmed that the plaintiff was not given any EOT in writing after the contract was terminated on 10 October 2012;

and

(2) the final EOT given by Mindef *via* its letter dated 27 September 2012 (CBOD1 Pt B p. 97) (where Mindef also referred to its previous letter dated 10 July 2012). In this letter, DW1, on behalf of the defendants, wrote to Mat Salleh bin Abdullah, the operations manager of the plaintiff (passed away on 23 September 2013; death certificate in CBOD3 Pt B p. 1), *inter alia*, the following:

> 2. Berdasarkan kepada pemerhatian Kementerian ini dan maklum balas yang diterima daripada Markas Armada Tentera Laut DiRaja Malaysia (TLDM), tiada sebarang perkembangan positif daripada pihak tuan bagi kerja-kerja pengapungan dan pelupusan Ex Kapal Sri Inderapura. Adalah diingatkan bahawa tarikh akhir penyempurnaan semua kerja-kerja yang berkaitan ialah pada 15 Oktober 2012.

A Kegagalan pihak tuan untuk menyelesaikan kerja-kerja tersebut sehingga tarikh akhir yang diperuntukkan akan membolehkan tindakan di bawah klausa-klausa yang diperuntukkan di dalam Dokumen Perjanjian Kontrak diimplimentasikan.

3. Kementerian ini juga ingin memaklumkan bahawa sebarang rayuan permohonan perlanjutan tempoh pelaksanaan kerja-kerja berkaitan tidak akan dipertimbangkan.

B

[83] This court is of the opinion that the two letters of Mindef in paras. 82(1) and (2) above, when read together, are sufficient to serve as a valid notice of termination of the contract to the plaintiff, without the necessity of another specific letter or notice of termination being given.

C

[84] The court finds that there is an inconsistency in DW1's evidence about the termination date of the contract. DW1 gave two termination dates, namely 10 October 2012 and 15 October 2012. However, Mindef's letter in para. 82(2) above dated 27 September 2012 is the later of the two letters, and it gives a later date of termination ie, 15 October 2012.

D

[85] The court accepts Mindef's letter in para. 82(2) above as the letter stating the effective date of termination of the contract which is 15 October 2012.

E

[86] The court holds that therefore the termination notices given by Mindef to the plaintiff *via* its two letters in paras. 82(1) and (2) above are valid, and the date of termination of the contract is 15 October 2012.

The Plaintiff's Claim Is Unjustified

F

[87] Considering that the plaintiff is the party which had breached the contract when it failed to carry out its contractual obligations to complete the disposal work within the stipulated period, the plaintiff's claim as pleaded in the statement of claim has no merits and is baseless, and hence unjustified. Therefore, the plaintiff's claim for special damages, costs of disposal of the ship, and damages for loss of profit, and interest and costs cannot be allowed.

G

Decision

[88] Based on the above considerations, on a balance of probabilities, the court holds that the plaintiff has failed to prove its claim against the defendants.

H

[89] Accordingly, the plaintiff's claim is dismissed. Costs of RM15,000 are to be paid by the plaintiff to the defendants.

I